

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
Norfolk Division**

**MICHAEL MCEVILY,**

**Petitioner,**

**v.**

**Case No. 2:03cv135**

**GENE M. JOHNSON,**

**Respondent.**

**ORDER & OPINION**

On September 28, 2007, Petitioner Michael McEvily (“Petitioner”) filed a Motion for Extension of Time to Note Appeal under FED. R. APP. P. 4. (Doc. 40). Petitioner requests this Court extend his time to appeal the Order of this Court entered May 10, 2007 (the “May 10 Order”) denying Petitioner’s Motion to Vacate a Void Order (Doc. 34) and Motion for Reconsideration (Doc. 35). Doc. 36.

In the May 10 Order, this Court informed Petitioner that the Court would consider no further filings in this action without a notice of appeal. Doc. 36 at 2. In the order, however, the Court misinformed Petitioner of his time to appeal. Id. The Order states Petitioner has sixty (60) days to file a notice of appeal of the May 10 Order with this Court. Had this motion stemmed from a federal conviction, and thus had been related to a claim under 28 U.S.C. § 2255, this would be the correct time period under FED. R. APP. P. 4(a)(1)(B). Because this motion stems from a state conviction, however, the time to file an appeal is only thirty (30) days under

FED. R. APP. P. 4(a)(1)(A). Petitioner filed a notice of appeal on July 2, 2007. Doc. 37. This date was within sixty (60) days but more than thirty (30) days from the entry of the May 10 Order. The Fourth Circuit dismissed Petitioner's appeal because it was untimely in that it was not filed within thirty (30) days. Doc. 39.

Petitioner now seeks to extend the time in which he can file his appeal of the May 10 Order. Doc. 40. Petitioner does not mention the mistake in the May 10 Order but argues instead that he did not receive notice of the entry of the order until after the thirty (30) day period had expired. Id. Petitioner was transferred twice to different correctional facilities shortly after the May 10 Order was entered. Doc. 40. Petitioner was transferred on May 13, 2007 and then again on June 22, 2007. Id. The May 10 Order, signed by this Court, was sent to his original facility on May 11 and was then forwarded to the second and third facilities. Id. Thus, Petitioner did not receive the May 10 Order until June 22, 2007. Id. This date was beyond the thirty (30) day window to file his appeal. Petitioner filed his appeal ten (10) days later. Doc. 37.

This Court **FINDS** that Petitioner did not receive notice of the entry of the Order until well after the time to file an appeal had expired. Additionally, this Court **FINDS** that a typographical error existed in the original order that may have affected Petitioner's filing. Thus, the Court **GRANTS** Petitioner's Motion for good cause and clerical error. Petitioner has fourteen (14) days from the entry of this Order to file his notice of appeal.

The Clerk is **REQUESTED** to mail a copy of this Order to Petitioner and to all Counsel of record.

It is so **ORDERED**.

/s/

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HENRY COKE MORGAN, JR.  
SENIOR UNITED STATES DISTRICT JUDGE

Norfolk, Virginia  
October 16, 2007